IN THE

SUPREME COURT OF

THE UNITED STATES

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No. 79-5515

JAMES AMBROSE BROWN,
Petitioner,

vs.

JAMES P. MITCHELL, SUPERINTENDENT,
VIRGINIA STATE PENITENTIARY, RICHMOND
VIRGINIA,
Respondent.

MOTION FOR LEAVE TO

PROCEED IN FORMA PAUPERIS

Petitioner respectfully requests the court to grant leave to file his petition for a writ of certiorari and proceed in forma pauperis. He was declared an indigent in the District Court and the undersigned counsel was appointed on appeal. He is presently incarcerated, and there has been no improvement in his financial status.

Respectfully Submitted,

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VIRGINIA STATE PENITENTIARY,
RICHMOND, VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES

OF APPEALS FOR THE FOURTH CIRCUIT

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1. Since a contrary result would contradict decisions of this Court and decisions in other circuits, the Court must make clear that the conclusion that a state writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a written request for temporary custody which triggers the mandatory trial-before-return rule of Article IV(e) of the Interstate Agreement on Detainers is not dependent on United States v. Mauro.....11

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Petitioner James Ambrose Brown respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment by the United States District Court for the Eastern District of Virginia, Norfolk Division, denying his petition for a writ of habeas corpus.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, entered May 9, 1979, is reported in 598 F.2d 835 (4th Cir. 1979). It is set out in Appendix A, infra. The Order of the Court of Appeals denying rehearing, entered May 31, 1979, is set out in Appendix B, infra. The Memorandum Order of the District Court, dated July 20, 1978, is unpublished. It is set out in Appendix C, infra. The Virginia Supreme Court denied a writ of error on direct appeal. Its order is unpublished and set out in Appendix D, infra.

JURISDICTION

The date of the judgment of the Court of Appeals which this petition seeks to have reviewed is May 9, 1979. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 31, 1979.

On July 19, 1979, Chief Justice Burger extended the time for filing this petition for a writ of certiorari until October 28, 1979. (A-54)

Original federal jurisdiction in this case, a habeas corpus proceeding by a Virginia prisoner seeking review of a Virginia conviction, was based upon 28 U.S.C. §2241 et. seq.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether this Court's recent decision in United States v. Mauro, 436 U.S. 340 (1978), holding that a federal writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a "written request for temporary custody" which triggers the mandatory trial-before-return rule of Article IV(e) of the Interstate Agreement on Detainers, was a necessary predicate to the conclusion that a state writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a "written request for temporary custody" which triggers the mandatory trial-before-return rule under the same provision.

2. If the conclusion that a state writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a written request for temporary custody which triggers the mandatory trial-before-return rule of Article IV(e) of the Interstate Agreement on Detainers is dependent on United States v. Mauro, supra, whether a court may refuse to apply the mandatory dismissal with prejudice remedy required by the Agreement on the ground that United States v. Mauro created a new rule of law which should not be applied to petitioner's case when no reported precedent existed at the time his case arose which suggested that a state writ of habeas corpus ad prosequendum filed after a detainer had been lodged was anything but a "written request" which triggered the trial-before-return rule of the Agreement.

STATUTORY PROVISIONS

1. Section 2 of the Interstate Agreement on Detainers, 18 U.S.C. App. pp. 1395-98 (1976), provides in pertinent parts:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, information, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State , and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint:

* * * *

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed.....If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated.

* * * *

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

* * * *

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment,information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had....

2. 28 U.S.C. §2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless

* * * *

(5) It is necessary to bring him into court to testify or for trial."

STATEMENT OF THE CASE

On March 14, 1976, when petitioner was in federal custody in the District of Columbia awaiting trial on a federal bank robbery charge, a detainer was filed against him in favor of Westmoreland County, Virginia, based upon an unrelated homicide charge then pending against him.

On October 21, 1976, three months after petitioner had been convicted and sentenced by the United States District Court for the District of Columbia on the bank robbery charge, the Commonwealth's Attorney secured a writ of habeas corpus ad prosequendum from the Westmoreland County Circuit Court in order to obtain temporary custody of petitioner. Pursuant to this writ, petitioner was transferred from the Lorton Reformatory, Lorton, Virginia, a District of Columbia institution, to the custody of Westmoreland County on October 28, 1976. A county grand jury indicted petitioner for homicide. Petitioner was arraigned and pleaded not guilty. He was then returned to federal custody.

On January 18, 1979, the Commonwealth of Virginia obtained a second writ of habeas corpus ad prosequendum and received custody of petitioner for a court-ordered psychiatric examination pursuant to petitioner's request. Following the examination, petitioner was again returned to Lorton Reformatory. On January 19, 1977, the Commonwealth of Virginia obtained a third writ in order to secure petitioner for trial.

On February 2, 1977 petitioner moved to dismiss the indictment with prejudice on the ground that the previous transfer violated Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. pp. 1395-1398 (1976) (hereinafter Agreement). The state trial court denied the motion. Petitioner was tried and convicted of murder on February 3, 1977 and sentenced to a term of 20 years.

Petitioner subsequently raised the Article IV(e) claim in a petition for a writ of error filed with the Supreme Court of Virginia. The court denied and dismissed petitioner's appeal on August 10, 1977 without opinion.

PETITION FOR FEDERAL WRIT OF HABEAS CORPUS

On January 20, 1978, prior to this Court's decision on United States v. Mauro, supra, petitioner petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.

Petitioner made the same Article IV(e) claim. Respondent argued that the Agreement was not triggered when a state secures the custody of a federal prisoner pursuant to a state writ of habeas corpus ad prosequendum and that, since the indictment was returned on October 28, 1976, the same day petitioner was first transferred into Virginia custody, it was not a "pending indictment" within the meaning of the Agreement. The district court denied on two alternative grounds: (1) the Agreement was not triggered when a state secures the custody of a federal prisoner pursuant to a writ of habeas corpus ad prosequendum filed after a detainer has been lodged; and (2) since state custody of petitioner was obtained prior to indictment, and since, under the interpretation of the Agreement rendered in United States v. Ricketson, 498 F.2d 367 (7th Cir. 1974), cert. denied 419 U.S. 956 (1974), pre-indictment custody is not within the Agreement, petitioner's transfer did not trigger the Agreement.

DISPOSITION OF THE CASE ON APPEAL

On appeal, petitioner pointed out that the district court's reliance on United States v. Ricketson was erroneous, because Ricketson, unlike petitioner's case, involved the transfer of a state prisoner to federal custody pursuant to federal writs of habeas corpus ad prosequendum issued without prior detainers. The Seventh Circuit did not hold that the Agreement is limited to post-indictment transfers, but rather that the Agreement was not invoked by a federal writ absent a detainer. 498 F.2d at 373. See also Echevarria v. Bell, 579 F.2d 1022, 1026 (7th Cir. 1978).

Moreover, Articles IV and V include pending information and complaint as well as indictment. Under Virginia law,[1/] the sworn statement of the county officer that served as the basis for the arrest warrant for petitioner is a complaint. Since petitioner's transfer to state custody was made pursuant to this complaint, it came under Article IV. See Agreement, Article IV(a), supra.

Secondly, petitioner argued that the district court's conclusion that the Agreement does not apply to the transfer of a federal prisoner to state custody pursuant to a state writ of habeas corpus ad prosequendum filed after a detainer had been lodged contradicted the letter and spirit of the Agreement, especially in light of this Court's explanation of the general purpose of the Agreement in United States v. Mauro, supra. The Court in Mauro recognized that Article IV(e) of the Agreement sought to achieve the statutory purpose of eliminating detainer abuse by requiring receiving states to fully prosecute a prisoner obtained pursuant to the Agreement prior to returning the prisoner to the original place of imprisonment. 436 U.S. at 350-53. Since it is the filing of the detainer which triggers the problems Article IV(e) attempts to eliminate, this Court held that fulfillment of the statutory purpose requires the conclusion that a federal writ is a request for temporary custody within the meaning of Article IV(e). Id at 361-62.

Petitioner further argued that Mauro does not set forth a nonretroactive new rule of law with respect to petitioner's case, because the decision did not overrule any past precedent or disrupt a long accepted and widely relied upon practice regarding prisoner transfers to states. See Chevron Oil v. Huson, 404 U.S. 97 (1971). At the time of the Mauro decision, federal courts

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1/ Va. Code §19.2-72 (1975 Replacement Volume).

were badly divided over the applicability of the Agreement to transfers of state prisoners to federal custody pursuant to federal writs. Moreover, no reported decision ever treated a state writ of habeas corpus ad prosequendum filed after a detainer as anything but a request for temporary custody under the Agreement.

Petitioner argued that, assuming arguendo that Mauro represents a new rule of law, that rule is retroactive under the rule of Robinson v. Neil, 402 U.S. 505 (1973). In Robinson, the Court retroactively applied Waller v. Florida, 397 U.S. 387 (1970) which barred a state and municipality from both prosecuting a defendant for the same offense on the ground that the dual prosecution constitutes double jeopardy. The Court held Waller retroactive because it was fundamentally unfair to subject the defendant to imprisonment where, under the new rule, the defendant would not have been tried at all. The result did not unfairly prejudice the state, since the state was not justified in relying upon favorable lower court decisions where the issue had not been authoritatively resolved.

Petitioner argued that, as was the case in Robinson, compliance with the Agreement prevents a trial from taking place at all. Virginia was not justified in relying on an interpretation of the Agreement which was totally unsupported by any authority.

Respondent's reply was premised on the mistaken understanding that Mauro involved the use of state as well as federal writs of habeas corpus ad prosequendum. Within this framework, respondent argued that the principle established in Mauro, which respondent characterized as the proposition that the Agreement was the exclusive means for a state to obtain temporary custody of a prisoner in another jurisdiction, was a new rule of law, because it disrupted the long accepted use of state writs for interstate prisoner transfers. With respects to retroactivity, re-

spondent argued that, since petitioner's case did not involve a constitutional guarantee comparable to the privilege against double jeopardy, the Mauro rule should not be given retroactive application, because Mauro was not foreshadowed and it does not affect the truth-finding function of trial.

DECISION OF THE FOURTH CIRCUIT

The Fourth Circuit panel held that Mauro established a new rule of law with regard to the use of state, as well as federal, writs, because it was not clearly foreshadowed. The court then held that the Mauro rule should not be given retroactive application because (1) there was a reasonable basis for Virginia's reliance on the premise that the use of a state writ to obtain custody of a federal prisoner does not trigger Article IV(e) of the Agreement; (2) Virginia complied with the statutory purpose of prompt disposition of charges against a prisoner subject to a detainer by trying petitioner 98 days after the state first obtained custody of him; (3) retroactive application of Mauro would disrupt the administration of justice; and (4) the Mauro rule would not enhance the reliability of petitioner's conviction.

PETITION FOR REHEARING

Petitioner sought rehearing en banc, arguing that the Fourth Circuit's decision overlooked the crucial distinction between a case, such as the petitioner's, where a state is the receiving state under the Agreement, and a case, such as Mauro, where the federal government uses its unique power under 28 U.S.C.

§2241(c)(5) to obtain custody of a state prisoner through the issuance of a federal writ of habeas corpus ad prosequendum.[2/]

The federal writ has national territorial effect and is binding against all states. Gray v. Benson, 443 F.Supp. 1284, 1289 (D.C. Kan. 1978). See generally, United States v. Mauro, 436 U.S. 340 (1978); Carbo v. United States, 364 U.S. 611 (1961); United States v. Kenaan, 557 F.2d 912, 916 n.8 (1st Cir. 1977). In contrast, a state writ is not enforceable against another state because it does not extend beyond the jurisdictional boundaries of the issuing court. Gray v. Benson, 443 F.Supp. at 1289.

Prior to the states' adoption of the Agreement in 1956, a state was not obligated to surrender its prisoners to a demanding state. The only means by which states could obtain prisoners from other jurisdictions were formal extradition procedures or special contracts governing prisoner transfers, Mauro, 436 U.S. at 355 n.23; United States v. Thompson, 562 F.2d 232, 238, 242-244 (3rd Cir. 1977) (en banc) (Garth, J. dissenting in Thompson and United States v. Sorrell, 562 F.2d 227 (3rd Cir. 1977),and states were not obliged to honor a request or state writ of habeas corpus ad prosequendum directed at a prisoner until after completion of his term of imprisonment. The Agreement remedied the situation by obligating the signatory states to produce prisoners for trial upon the requisite demand by another party state during the period of imprisonment. See Articles I and IV(e).

Since the Agreement contemplated interstate,rather than federal-state,transfers, the procedural requirement and applicability of the Agreement posed no interpretative problems during

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2/ Every case cited in the opinion below for the proposition that Mauro resolved a split in the Circuits, and was thus new law, involved circumstances where the federal government was the receiving state. See United States v. Sorrell, 562 F.2d 227 (3rd Cir. 1977) (en banc); United States v. Thompson, 562 F.2d 232 (3rd Cir. 1977) (en banc); United States v. Chico, 558 F.2d 1047 (2nd Cir. 1977); Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912 (1st Cir. 1977); United States v. Ford, 550 F.2d 732 (2nd Cir. 1977); United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977); United States v. Mauro, 544 F.2d 588 (2nd Cir. 1976). All of these cases, with the exception of Ford, dealt with the issue of whether the federal writ should be treated as a detainer under the Agreement. Judge Mansfield, who had dissented in Mauro, wrote the opinion for the court in Ford which held that the federal writ when issued after a detainer had been lodged amounted to a written request for temporary custody under the Agreement.

the first 14 years of its existence when it only governed interstate transfers. The participation of the federal government as a party to the Agreement gave rise to difficult problems of interpretation after 1970.

Mauro resolved the conflict in the circuits when the Court held that the federal writ is not a detainer under the Agreement. However, since the filing of a detainer precipated the very problems of detainer abuse addressed by the Agreement, the Court also held in Mauro that when the federal government first files a detainer and later files a writ, the writ of habeas corpus ad prosequendum is a request for temporary custody under the Agreement. 436 U.S. at 361-62.

Mauro is silent as to the applicability of the Agreement in the transfer of a federal prisoner to state custody. The procedural responsibilities of a state as a receiving party were unambiguously established by the Agreement.

The Fourth Circuit denied petitioner's petition for rehearing and suggestion for rehearing en banc without opinion.

REASONS FOR GRANTING THE WRIT

I. SINCE A CONTRARY RESULT WOULD CONTRADICT DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS, THE COURT MUST MAKE CLEAR THAT THE CONCLUSION THAT A STATE WRIT OF HABEAS CORPUS AD PROSEQUENDUM FILED AFTER THE LODGING OF A DETAINER IS A WRITTEN REQUEST FOR TEMPORARY CUSTODY WHICH TRIGGERS THE MANDATORY TRIAL BEFORE RETURN RULE OF THE AGREEMENT IS NOT DEPENDENT ON MAURO.

The conclusion of the Court of Appeals that Mauro represents a new rule of law which should not be retroactively applied to petitioner's transfer from federal to state custody was premised on the erroneous failure to distinguish between a case, such as petitioner's, where a state is the receiving party,and a case such as Mauro,where the federal government is the receiving party and uses its unique power under 28 U.S.C. §2241(c)(5)

to obtain custody of a state prisoner through the issuance of a federal writ of habeas corpus ad prosequendum. In noting that Mauro resolved a split in the circuits, 598 F.2d at 838, the Court of Appeals failed to recognize that those circuit decisions involved only the use of federal writs.[3/] Likewise, the Fourth Circuit failed to note that Mauro was limited to federal writs.

The court of appeals failed to accurately interpret Mauro as limited to the federal context. As a practical matter, the court of appeals' decision means that prisoners had no protection against state use of a writ of habeas corpus ad prosequendum to circumvent the trial-before-return rule for the 14 years that the federal government was not an Agreement signatory and the 8 more it took this court to solve a completely unrelated problem. Its decision has the effect of rendering Mauro generally applicable to all prisoner transfers, including transfers where states are the receiving parties. Since Mauro held that the writ is not itself a detainer and, therefore, does not trigger the provisions of the Agreement, application of Mauro to state as well as federal writs would mean that a state may circumvent the Agreement by simply filing a writ of habeas corpus ad prosequendum without the prior lodging of a detainer. This result suggests that state writs have the same national territorial effect and stand on the same constitutional footing as federal writs under 28 U.S.C. §2241. This result is completely unsupported by judicial or statutory authority.

In holding that the Agreement did not apply to a federal-state transfer absent a retroactive application of Mauro, the Fourth Circuit also ignored decisions in other Circuits. Several courts have recognized the distinction between interstate and federal-state transfers in holding that the Agreement is the exclusive means for a state to secure temporary custody of

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3/ See footnote 2, supra.

an extrajurisdictional prisoner, while the Agreement was only an alternative to 28 U.S.C. §2241 for the federal government. United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977); United States ex. rel. Escola v. Groomes, 520 F.2d 820 (3rd Cir. 1975); Gray v. Benson, 443 F.Supp. 1284 (D.C. Kan. 1978). Lower federal courts have also been uniform in applying the procedural requirements of the Agreement where states have been the "receiving party." See e.g., Stroble v. Egeler, 408 F.Supp. 630 (E.D. Mich. 1976); Adams v. Cuyler, 441 F.Supp. 556 (E.D.Pa. 1977); Gray v. Benson, supra. The Fourth Circuit was alone in reaching for authority outside of the express provisions of the Agreement to support the applicability of the Agreement to the petitioner's transfer to state custody.

II. THE RETROACTIVITY ANALYSIS OF THE COURT OF APPEALS DIRECTLY CONTRADICTS THIS COURT'S CONTROLLING PRECEDENTS.

The Fourth Circuit ignored Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) in finding that Mauro represents a nonretroactive new rule of law regarding the applicability of the Agreement to the extrajurisdictional transfers to states. Chevron Oil taught that nonretroactivity analysis must be preceded by a preliminary determination that the decision in question established a new legal principle by either overruling clear past precedent or deciding an issue of first impression whose resolution was not clearly foreshadowed. Id at 100. Mauro was not such a decision with respect to states. The law concerning extrajurisdictional transfers of prisoners to states was unambiguously established by the Agreement itself. Lower federal courts had been uniform in applying the procedural requirements of the Agreement where states have been the "receiving states." See,e.g., Stroble v. Egeler, supra; Adams v. Cuyler, supra; Gray v. Benson, supra. Thus, the Fourth Circuit clearly contradicted Chevron Oil by applying nonretroactivity analysis to a decision which did not change the law.

The Fourth Circuit's treatment of Mauro also requires the Court to clarify Robinson v. Neil, 409 U.S. 505 (1973), and the relationship between Robinson and Linkletter v. Walker, 381 U. S. 618 (1965). Linkletter represents the general rule in criminal cases that only those rulings which would enhance the integrity of the fact finding process are given retroactive application. Robinson carved out an exception to this general principle for rulings aimed at preventing a trial from taking place at all. The Linkletter concern with accuracy in factfinding at trial is inappropriate for Robinson-type cases, since the issue in the latter setting focuses on the propriety of the occurrence of the trial itself. 409 U.S. at 507. If a trial should not have been had in the first place, the accuracy of the factfinding function is irrelevant. It is this distinction that makes the guarantee against double jeopardy in Robinson significantly different from other procedural guarantees, rather than a difference in the value or right protected by the new ruling.

The decision of the Fourth Circuit would encourage lower federal courts to undertake unwarranted balancing tests to ascertain whether a new ruling protects a right or value of sufficient constitutional weight to merit retroactive application. Such an approach is inherently problematic, in view of other decisions by this Court in which the Linkletter analysis was applied to constitutional rights of obvious constitutional importance. See, e.g., United States v. Peltier, 422 U.S. 531, 535-8 (1975) (requirements of the Fourth Amendment to automobile searches by United States Border Patrol on vehicles removed from the border held not retroactive), Linkletter v. Walker, supra, (Fourth Amendment exclusionary rule not given retroactive effect). Thus clarification by this Court is necessary to prevent further misapplication of Robinson.

CONCLUSION

For the foregoing reasons, it is requested that a Writ of Certiorari be issued to review the decision of the Court of Appeals.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the attached Petition for a writ of certiorari was mailed on October 16, 1979 to:

Marshall Coleman, Esq.
Attorney General of Virginia
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Richmond, Virginia 23219

Michael E. Geltner

APPENDICES APPENDED

Appendix A	Opinion of the United States Court of Appeals for the Fourth Circuit in this Case.
Appendix B	Order of May 31, 1979 of the Court of Appeals, denying rehearing.
Appendix C	Memorandum Order of July 20, 1978, of the United States District Court for the Eastern District of Virginia, Norfolk Division, denying petition for a writ of habeas corpus.
Appendix D	Order of August 10, 1977, of the Supreme Court of Virginia, denying petition for a writ of error.

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-6444

James Ambrose Brown,

Appellant,

-v-

James P. Mitchell, Superintendent of the Virginia State Penitentiary,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued January 8, 1979

Decided May 9, 1979

Before BUTZNER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

Larry J. Ritchie (Michael E. Geltner, Professor; Geoffrey W. Mangum, Third Year Law Student, Georgetown University Law Center on brief) for appellant; Jim L. Chin, Assistant Attorney General (Marshall Coleman, Attorney General of Virginia on brief) for appellee.

BUTZNER, Circuit Judge:

The sole issue in this appeal is whether United States v. Mauro, 436 U.S. 340 (1978), applies to a state conviction that became final prior to the date when Mauro was decided.[1] Under the Supreme Court's interpretation of the Interstate Agreement on Detainers in Mauro, the Commonwealth of Virginia tried James Ambrose Brown in violation of Article IV(e) of the Agreement. However, applying the controlling test of Linkletter v. Walker, 381 U.S. 618 (1965), and Stovall v. Denno, 388 U.S. 293 (1967), we conclude that Mauro does not apply retroactively and affirm the district court's denial of a writ of habeas corpus.

In Mauro the Supreme Court reviewed two decisions: United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), and United States v. Ford, 550 F.2d 732 (2d Cir. 1977). In both cases the United States had obtained temporary custody of prisoners by writs of habeas corpus ad prosequendum. In Ford, but not in Mauro, the United States had filed a detainer before obtaining custody. The Second Circuit held that a writ of habeas corpus ad prosequendum was a "detainer"

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1. The state has not challenged the appellant's right to raise this issue in a collateral proceeding under 28 U.S.C. § 2254. We find it unnecessary to consider the constitutional questions implicit in this issue because we conclude that Mauro should not be applied retroactively. See Bowen v. United States, 422 U.S. 916, 920 (1975).

entitling the prisoner to the protection of the Agreement. Upon finding violations of the speedy trial provisions of the Agreement, the court dismissed both indictments. Drawing a sharp distinction between a prisoner subject to a detainer and one who was not, the Supreme Court affirmed the judgment of the court of appeals in Ford but reversed in Mauro. The Court held that the writ is not itself a "detainer" and therefore that it "does not trigger the application of the Agreement". It also held that the writ is a request for temporary custody which, when preceded by the lodging of a detainer, requires compliance with the Agreement. 436 U.S. at 349, 361-62.

The Supreme Court's decision enables a prisoner subject to a detainer whose custody has been obtained by a writ of habeas corpus ad prosequendum to invoke Article IV of the agreement. Article IV(e) requires the receiving state[2] to try the prisoner before returning him to the state in which he was previously imprisoned and mandates dismissal of the charges with prejudice if the receiving state fails to comply.[3] Interstate Agreement on Detainers, 18 U.S.C. App. A, Article IV(e); Va. Code Ann. § 53-304.1, Article IV(e) (1978).

---

2. Article II(c) of the Agreement defines "Receiving State" as "the State in which trial is to be had on an indictment, information or complaint pursuant to article III or IV hereof."

3. Article IV(e) of the Agreement provides as follows:

On March 14, 1976, when Brown was in federal custody in the District of Columbia awaiting trial on robbery charges, a detainer was filed against him based upon unrelated homicide charges then pending in Westmoreland County, Virginia. In July, 1976, Brown was convicted on the robbery charges and incarcerated at the District of Columbia reformatory in Lorton, Virginia.

On October 21, 1976, the Commonwealth of Virginia secured a writ of habeas corpus ad prosequendum from the state trial court in order to obtain temporary custody of Brown. Pursuant to that writ, the state transferred Brown from Lorton to Westmoreland County on October 28. A county grand jury indicted Brown for first-degree murder. At his arraignment he pled not guilty, counsel was appointed, and trial was set for December 22. The state promptly returned Brown to federal custody. On December 20, the court granted Brown's motion for a continuance, setting the trial for February 3, 1977.

---

3. continued

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

On January 18, 1977, the state secured a second writ of habeas corpus ad prosequendum and obtained custody of Brown for a psychiatric examination ordered by the court at Brown's request. Following the examination, Brown was again returned to Norfolk. On January 19, the state secured a third writ in order to obtain Brown's presence for trial.

The state trial court denied Brown's pretrial motion to dismiss the indictment on the ground that the previous transfers violated Article IV(e). On February 3, Brown was tried and convicted of first-degree murder. He again raised his Article IV(e) claim in a petition for a writ of error filed with the Supreme Court of Virginia. That court denied the writ without opinion.

Brown filed a petition for a writ of habeas corpus in the federal district court on January 20, 1978. The district court denied the writ because in its view the Interstate Agreement on Detainers did not apply. The court did not address the issue of Mauro's retroactive application.

On appeal, Brown does not contend that the rights recognized in Mauro are themselves constitutionally protected.[4] He does, however, advance an argument based on the due

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4. Other courts have held that the Agreement establishes procedural rules which do not rise to the level of constitutionally protected rights. See, e.g., Camp v. United States, 587 F.2d 397, 400 (8th Cir. 1978); United States v. Palmer, 574 F.2d 164, 167 (3d Cir. 1978); Edwards v. United States, 564 F.2d 652, 653-54 (2d Cir. 1977).

process clause, contending that it would be fundamentally unfair to deny him the benefit of Mauro. He asserts that the indictment should be dismissed because Mauro precludes the state from trying him. He emphasizes that under Mauro's construction of the Agreement, a state which follows the procedure that was used by Virginia in his case must dismiss the indictment with prejudice.

At the outset, we reject Brown's contentions that Mauro sets forth no new rule of law and that retroactivity is automatic. The threshold test for nonretroactivity analysis is set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). In that case, the court explained: "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ."

Mauro is such a decision. Prior to Mauro, three of the five courts of appeals that had considered the issue held that transfers pursuant to writs of habeas corpus ad prosequendum were not subject to the Interstate Agreement on Detainers. See Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977); United States v. Kenaan, 557 F.2d 912 (1st Cir. 1977); United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977). The two courts of appeals which had found that the Agreement established rights of prisoners when the writ was

utilized did so only over vigorous dissents. See United States v. Sorrell, 562 F.2d 227 (3d Cir. 1977) (en banc) (dissenting opinion of Weis, J., for himself and two other judges, and dissenting opinion of Garth, J., both appended to companion case of United States v. Thompson, 562 F.2d 232, 235-46 [3d Cir. 1977]); United States v. Ford, 550 F.2d at 744-45 (Moore, J., dissenting); United States v. Mauro, 544 F.2d at 595-97 (Mansfield, J., dissenting).

With the exception of the Second Circuit's holding in Ford, none of these decisions attributed dispositive significance to the presence or absence of a detainer. In addition, the Second Circuit's holdings in Mauro and Ford did not apply to situations in which temporary custody was obtained for arraignment and the prisoner was promptly returned. See United States v. Chico, 558 F.2d 1047 (2d Cir. 1977). The Third Circuit's holding in Sorrell apparently applies only to writs issued after the date of that decision. United States v. Boyd, 437 F. Supp. 519 (W.D. Pa. 1977), aff'd without opinion, 578 F.2d 1376 (3d Cir. 1978).

We therefore conclude that Mauro authoritatively established a principle of law which "was not clearly foreshadowed." See Chevron Oil, 404 U.S. at 106. Accordingly, in order to prevail, Brown must satisfy the established requirements for retroactivity.

In Linkletter v. Walker, 381 U.S. 618, 636-38 (1965), and in Stovall v. Denno, 388 U.S. 293, 296-300 (1967), the

Supreme Court held that four factors generally control the determination of whether a decision announcing a new principle of law is to be given retrospective effect:

> (1) the extent of reasonable reliance upon the premise that the now-condemned conduct was legitimate;
>
> (2) the purpose of the new rule and the extent to which that purpose will be aided by retroactivity;
>
> (3) the effect on the administration of justice of applying the new rule retroactively; and
>
> (4) the extent to which the new rule bears on the defendant's guilt or innocence.

Some cases, of course, do not fit neatly within this analytical scheme. Overriding constitutional policies that have nothing to do with the guilt or innocence of the defendant may compel retroactivity.[5] Linkletter and Stovall, nevertheless, set forth the basic test for nonretroactivity.

As our discussion of the state of the law prior to Mauro indicates, there was a reasonable basis for Virginia's reliance on the premise that use of a writ of habeas corpus ad prosequendum to obtain custody of a prisoner for pretrial proceedings does not trigger Article IV(e) of the agreement.

The purpose of the rule announced by the Supreme Court in Mauro is the same as the purpose of the Interstate Agreement on Detainers: to encourage the prompt disposition of

---

5. An example is the fifth amendment guarantee against double jeopardy. See Robinson v. Neil, 409 U.S. 505, 507-09 (1973).

charges against a prisoner who is subject to a detainer and thereby to prevent frustration of rehabilitation efforts. This purpose would not be aided by applying Mauro to Brown's case. Virginia fully complied with the purpose of the rule announced in Mauro. Brown was tried 98 days after the state first obtained custody of him from the District of Columbia. Forty-three days of that period represent the continuance granted at Brown's request. This is well within the 120-day speedy trial period set forth in Article IV(c) of the Agreement.[6]

Retrospective application of the rule of Mauro would also have substantial disruptive effects upon the administration of justice. The Court's discussion of the history of the writ of habeas corpus ad prosequendum in Carbo v. United States, 364 U.S. 611 (1961), illustrates the relatively widespread reliance by prosecutors on use of the writ before trial. The divergent views on its relation to the Agreement on Detainers, which we have previously mentioned, have doubtless produced many cases involving the use of both a detainer and a writ.

---

6. Article IV(c) of the Agreement provides:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Finally, Virginia's use of the procedure now condemned in Mauro does not impugn the reliability of Brown's conviction. There is no evidence that returning Brown to Lorton prejudiced his defense. All four Linkletter-Stovall factors therefore compel nonretroactivity.

Brown contends that regardless of the Linkletter-Stovall factors, we must reverse his conviction. He emphasizes that under Mauro's interpretation of the Agreement, Virginia would have been precluded from trying him at all. He relies on Robinson v. Neil, 409 U.S. 505 (1973). In Robinson, the court ordered retroactivity of its holding in Waller v. Florida, 397 U.S. 387 (1970), that the double jeopardy clause bars successive state and municipal prosecutions based on the same act or offense. The Court did so despite the fact that truth-finding was not implicated. Brown argues that Article IV(e) and Mauro are analogous to the double jeopardy clause and Waller, respectively, because both Article IV(e) and the double jeopardy clause prevent certain trials from taking place at all.

The Supreme Court, however, carefully limited Robinson, noting that the guarantee against double jeopardy is "significantly different" from other new procedural guarantees which are generally nonretroactive. See 409 U.S. at 509; see also United States v. Bowen, 500 F.2d 960, 979 (9th Cir. 1974), aff'd, 422 U.S. 916 (1975). The values protected by the double jeopardy clause are indeed different from those

protected by the Agreement. The guarantee against double jeopardy is directed at the evil of a second trial in and of itself. In contrast, the purpose of the Article IV(e) restriction on prosecutions is to insure prompt disposition of detainers. As we have demonstrated, Virginia's conduct in relation to Brown was fully consistent with this purpose.

Accordingly, Brown is not entitled to retrospective application of Mauro. The judgment of the district court is affirmed.

APPENDIX B

FILED

MAY 31 1979

U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-6444

James Ambrose Brown,

Appellant,

versus

James P. Mitchell, Supreintendent
of the Virginia State Penitentiary,

Appellee.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Russell, and Judge Field.

For the Court,

/s/ William K. Slate, II

CLERK

pec 6/6/79 ldm

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

JAMES A. BROWN Petitioner	)	
v.	)	MISC. NO 78-67-N
JAMES P. MITCHELL, Superintendent of the Virginia State Penitentary Respondent	)	

MEMORANDUM ORDER

Petitioner, a state court prisoner, signed a petition for a writ of habeas corpus received by the Clerk of this Court, Norfolk, Virginia, on January 20, 1978, and Orders of this Court of January 31, 1978, and February 27, 1978, were filed.

It is ORDERED that James P. Mitchell be substituted as the proper party respondent.

Petitioner was convicted after his Not Guilty plea and a jury trial on February 3, 1977, in the Circuit Court of Westmoreland County for the crime of murder. Petitioner was sentenced to a term of twenty (20) years.

Upon writ of error, the trial court was affirmed by the Supreme Court of Virginia on August 10, 1977.

The allegation of the instant petition contends that petitioner's right to a speedy trial under the Interstate Agreement on Detainers was violated because the petitioner was transferred from the custody of the District of Columbia to the Commonwealth of Virginia and returned several times before he was tried on the murder charges.

This claim was raised in petitioner's writ of error and exhaustion of state court remedies was accomplished.

The prosecution filed a writ of habeas corpus ad prosequendum against petitioner on October 21, 1976, contending that "the Commonwealth desires to proceed against him as quickly as possible, and that it is necessary to determine who his attorney is and to set a date for his trial if the grand jury returns a true bill against him." The grand jury was to consider the case on

October 28, 1976. Petitioner was at that time incarcerated in the Lorton Reformatory, Lorton, Virginia. The writ was granted, petitioner appeared before the Grand Jury, and was returned to the District of Columbia. A true bill was returned and trial was set for December 2, 1976.

By Order of November 23, 1976, the trial court granted petitioner's motion for a psychiatric exam. The trial previously set for December 22, 1976, was continued on petitioner's motion of December 20, 1976, in order to have a transcript of another trial prepared for petitioner. Petitioner was, by Order, moved to a psychiatrist for an exam which was arranged by defense counsel.

On January 19, 1977, the prosecution filed a petition for a second writ of habeas corpus ad prosequendum to obtain physical custody of petitioner for trial, which was granted. On February 2, 1977, the petitioner filed a motion to dismiss the indictment with prejudice on the same grounds as the instant petition, which was denied. (T 3-9). Trial took place on February 3, 1977.

Petitioner at no time filed any motion for a speedy trial nor for a speedy trial under the Interstate Agreement on Detainers.

Petitioner was obtained in October, 1976, by writ of habeas corpus ad prosequendum, and since this action was not pursuant to the Interstate Agreement on Detainers, petitioner's return to the other jurisdiction prior to trial on the merits does not entitle petitioner to habeas corpus relief here.

The Act is only applicable when there are pending charges and the accused is obtained pursuant to the Act to prosecute the criminal charge. See Article V(d). When petitioner's presence was obtained pursuant to the writ of habeas corpus ad prosequandum, filed on October 23, 1976, there were no pending criminal charges, as the grand jury only returned a true bill on October 28, 1976. Instances of custody before the indictment do not come within the scope of the Act. United States v. Ricketson, 498 F2d 367, cert. denied 419 U.S. 956 (1974). See also the Interstate Agreement on Detainers, 18 U.S.C.A. Appendix, at pp. 271-275 of the 1978 Supplement.

The January 18, 1977, custody was pursuant to petitioner's request for psychiatric evaluation for his benefit, and not for

trial purposes, and thus that appearance and return to the original jusisdiction fails to come within the intent of the Act. See Ricketson (supra).

Petitioner's custody on February 3, 1977, pursuant to the writ filed January 19, 1977, was for trial purposes, and he was tried and convicted on that date. Clearly petitioner's right to a speedy trial has not been violated. Even applying the provisions of the Act to petitioner's prosecution, the one hundred twenty (120) day time limitation for prosecution under Article IV(c) of the Act began with petitioner's arraignment on February 3, 1977, and not before said date. Petitioner is not entitled to relief under IV(c) of the act as he was immediately tried on February 3, 1977. The two prior occasions of custody as set out above were not pursuant to the Act, as one was pre-indictment, and the other was at the request of petitioner, and thus Article IV(e) affords petitioner no relief.

This Court finds that there is no merit in petitioner's allegation, as was found by the Supreme Court of Virginia on August 10, 1977.

It is ORDERED that the petition be, and it hereby is, DENIED and DISMISSED.

The petitioner may appeal in forma pauperis from this final order by filing a written notice of appeal with the Clerk of this Court, P.O. Box 1318, Norfolk, Virginia 23501, within thirty (30) days from this date. For the reasons above stated, the Court declines to issue a certificate of probable cause.

Let the Clerk send copies of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of Westmoreland County, and to the petitioner.

United States District Judge

Norfolk, Virginia
July 20, 1978.

APPENDIX D

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 10th day of August, 1977.

The petition of James Ambrose Brown for a writ of error to a judgment rendered by the Circuit Court of Westmoreland County on the 3rd day of February, 1977, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said court, which court shall allow court-appointed counsel the sum of $100 as compensation for services rendered on this appeal, and also his necessary direct out-of-pocket expenses.

And it is ordered that the Commonwealth recover of the plaintiff in error the costs to be taxed by the clerk of this court and the costs to be assessed in this case by the clerk of the court below.

Record No. 770733

A Copy,

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk

Costs due the Commonwealth by plaintiff in error in Supreme Court of Virginia:

Attorney's fee	$100.00 plus his costs and expenses
Filing fee	1.50

Teste:

Howard G. Turner, Clerk

By:

Deputy Clerk

EXHIBIT D

Dec. 31, 1977

(b) The trial judge also found the existence of statutory aggravating circumstance Code Ann. § 27-2534.1(b)(2) in that the Hall County murder was committed in the course of another capital offense, the Habersham County murder.

Subsequent to our decision in this case, but prior to transmittal of the remittitur to the trial court, the Supreme Court of the United States decided Standefer v. United States, 48 LW 4634 (June 9, 1980). The following language from that case is relevant to our discussion in the main opinion of the effect of appellant's subsequent acquittal of the first murder in Habersham County:

> "This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U. S. 476, 492 (1957). While symmetry of results may be intellectually satisfying, it is not required." 48 LW at 4638.

Judgments of affirmance of the death penalty adhered to. All the Justices concur except Hill, J. who concurs in the judgment and in part (a) of the Addendum.

Clerk's Office, Supreme Court of Ge[illegible]

DEAR SIR: ATLANTA 4/29/80

The motion for a rehearing was denied today:

Case No. 35701, Fair v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX 2

APPENDIX 2

In The Superior Court
of Habersham County
Ga -

State of Ga
vs.
Keith Fair No _____

Verdict

We find the Defendant
Not Guilty

This 16th Day of Nov. 1979

Gertrude B. O'Kard
FOREPERSON

GEORGIA, HABERSHAM COUNTY
This is to certify that the within document
is a true and correct copy of the original on file
in this office.
This 20th day of Nov. 1979
Lillian W. Mauldin
Deputy Clerk, Superior Court

APPENDIX 3

GEORGIA, HABERSHAM COUNTY.

The Grand Jurors selected, chosen, and sworn for the County of HABERSHAM to-wit:

1. Wm Curtis Stevenson Jr
2. Walton Roger Bentley
3. W.C. Parrott
4. Tim Terrell Crowe
5. John N. Mikel
6. Thomas Comer Abbey Jr.
7. J Lee Killian Jr
8. Billy Parrott
9. Larry Clark Perkins
10. Darby D. Burns
11. Jimmie R. Cleveland
12. Fred Scoggins
13. Mrs Norman (Vicky) Penfield
14. Mrs J.T. Dellinger
15. Mrs A.G. Crews
16. Howard Chitty
17. Robert L Thurston
18. Cole Allen
19. Charles E Parrott
20. Stanley Knight
21. Carter Farrell
22. Charles Ray Davis
23. Ronald J Carlson

in the name and behalf of the Citizens of Georgia, charge and accuse KEITH FAIR

of the County and State aforesaid, with the offense of MURDER

for that the said KEITH FAIR on the 8th day of MAY in the year 19 79, in the County aforesaid, did unlawfully

and with malice aforethought kill one Edmond Hoyt Turner, a human being, by shooting the said Edmond Hoyt Turner with a certain pistol,

GEORGIA, HABERSHAM COUNTY
This is to certify that the within docume
is a true and correct copy of the original on f
in this office.
This 26th day of NOV. 1979
Clerk, Co

contrary to the laws of said State, the good order, peace and dignity thereof.

Superior Court of said County AUGUST TERM, 19 79

V.D. STOCKTON, DISTRICT ATTORNEY

ROBERT F. PITTS Prosecutor

The Defendant KEITH FAIR waives being formally arraigned and pleads not guilty.

This 12 day of November 1979.

V.D. Stockton District Attorney

Copy of bill of indictment and list of witnesses sworn before Grand Jury waived before arraignment.

Bruce B. Haven Defendant's Attorney

Keith Fair Defendant

No. 4273 Page 213

HABERSHAM

SUPERIOR COURT

TERM, AUGUST 1979

THE STATE
vs.
KEITH FAIR

MURDER (26-1101)

True Bill

Henry L. Parmer Foreman

V.D. STOCKTON, DISTRICT ATTY.

ROBERT F. PITTS Prosecutor

WITNESSES

STANLEY L. THOMPSON, GBI
T. I. STOKE, GBI
JOHN ATAWAY, HALL CO. S.D.
MORGAN WHITLOCK
JUNIOR SEGERS
DEXTER THOMAS
SHERRILL LAND
REBECCA NATIONS
BYRON DAWSON, CRIME LAB
BILL PITTS
Ricky Turner
Estelle Fitz
Gail Williamson
William B. Thrash
Melvin Ray Pearson
Michael Marable

NDA- 8-4-79
Mailed- 8-9-79

IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1980

KEITH FAIR,

PETITIONER

Vs.

STATE OF GEORGIA,

RESPONDENT.

NO._____

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, KEITH FAIR, who is now held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari to the Georgia Supreme Court without prepayment of costs and to proceed in forma pauperis.

In support of this motion petititioner has attached as Appendix A to this motion an affidavit executed by petitioner on June 27, 1980.

In further support of this motion, petitioner has attached as Appendix B to this motion an affidavit executed by petitione on September 13, 1979.

WHEREFORE, petitioner respectfully moves this Honorable Court to grant him leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respectfully Submitted,

George W. Brinson

George W. Brinson
LEADING COUNSEL FOR PETITIONER

P.O. Box 430
Gainesville, Georgia 30503
Phone: (404) 536-0101

ORIGINAL COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5515

JAMES AMBROSE BROWN,

Petitioner,

v.

JAMES P. MITCHELL, SUPERINTENDENT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION ~~TO GRANTING OF WRIT OF~~ CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

VERA MADEL SPEAKES WARTHEN
Assistant Attorney General

Supreme Court Building - State Library Building
Richmond, Virginia 23219

ATTORNEY GENERAL OF VIRGINIA
RICHMOND, VIRGINIA 23219

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5515

JAMES AMBROSE BROWN,

Petitioner,

v.

JAMES P. MITCHELL, SUPERINTENDENT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, James P. Mitchell, Superintendent, Virginia State Penitentiary, respectfully prays that a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit of May 9, 1979, not be granted.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 598 F.2d 835 (4th Cir. 1979) and is attached to the Petition as Appendix A. The Memorandum Order of the District Court is unreported but is attached to the Petition as Exhibit C.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that United States v. Mauro established new law that a state writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a written request for temporary custody within the meaning of Article IV(e) of the Interstate Agreement on Detainers and in utilizing Linkletter v. Walker in holding Mauro nonretroactive.

STATUTES INVOLVED

The relevant statutes are set forth in the Petition at pages 3-4.

STATEMENT OF THE CASE

Petitioner was tried by a jury on February 3, 1977, in the Circuit Court of Westmoreland County, Virginia, wherein he was convicted of first degree murder and was sentenced to serve a term of twenty (20) years in the Virginia State Penitentiary.

Prior to trial on the merits, petitioner filed a Motion to Dismiss Indictment with Prejudice on the ground that he was being tried in violation of Article IV(e) of the Interstate Agreement on Detainers (Agreement). The motion was denied by the trial court. The grounds stated for the motion were that the Commonwealth had obtained custody of petitioner from federal custody in October, 1976, pursuant to a writ of habeas corpus ad prosequendum after a detainer had been lodged against petitioner by Westmoreland

County, Virginia, and that petitioner had been returned to federal custody without being tried.

From his conviction petitioner filed a petition for appeal with the Supreme Court of Virginia and asserted, among other assignments of error, that the motion to dismiss pursuant to Article IV(e) of the Agreement had been erroneously denied in that the Commonwealth of Virginia had obtained custody of him on October 28, 1976, and had returned him to federal custody without trying him.

After considering the Commonwealth's brief in opposition, the Virginia Supreme Court rejected the petition for appeal and affirmed the judgment below by order of August 10, 1977.

Petitioner subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, in which he asserted that he was transferred three times from federal custody to state custody while having a state detainer lodged against him (October 28, 1976; January 18, 1977; February 3, 1977); and that therefore his trial on February 3, 1977, was in violation of Article IV(e) of the Agreement. The District Court denied the petition for a writ of habeas corpus by Memorandum Order dated July 20, 1978, finding that petitioner had been obtained in October, 1976, by writ of habeas corpus ad prosequendum and not pursuant to the Agreement; that when custody of petitioner was obtained in October, 1976, the custody was pre-indictment and there were no pending criminal charges against him as required for applicability of the Agreement; that custody of petitioner was obtained in January, 1977, pursuant to petitioner's request for psychiatric

evaluation for his benefit, not for trial purposes, so that the Agreement did not apply to such appearance; and that petitioner's custody on February 3, 1977, was for trial purposes and that he was immediately tried.

A certificate of probable cause for appeal was granted petitioner by the Court of Appeals on October 3, 1978. In the Court of Appeals petitioner contended that the District Court was wrong in holding that the petitioner's October, 1976, transfer pursuant to a writ of habeas corpus ad prosequendum was not a transfer pursuant to the Agreement. Petitioner relied on United States v. Mauro and United States v. Ford, 436 U.S. 340 (1978), decided after the petitioner's conviction was final. Petitioner contended further that the District Court was wrong in holding that petitioner's pre-indictment transfer in October, 1976, was not within the scope of the Agreement inasmuch as there was, at the time of the transfer, no pending criminal charge. Petitioner contended further that United States v. Mauro, supra and United States v. Ford, supra, controlled disposition of his case but also asserted that Mauro and Ford did not constitute a new rule of law, but that even if they did, the rule should be applied retroactively so as to govern his case.

The Court of Appeals held that under Mauro the Commonwealth of Virginia had tried petitioner in violation of Article IV(e) of the Agreement. The Court of Appeals further held Mauro to be new law and that it would be nonretroactive applying the controlling test of Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967).

On petition for rehearing filed with the Court of Appeals petitioner again contended that Mauro did not constitute new

law, alleging that the Court of Appeals was in error for not distinguishing between cases involving state writs of habeas corpus ad prosequendum and those involving federal writs of habeas corpus ad prosequendum. The petition for rehearing was denied by the Court of Appeals by order dated May 31, 1979.

STATEMENT OF FACTS

Petitioner was in federal custody in the District of Columbia when a detainer was filed against him in March, 1976, based upon charges in Westmoreland County, Virginia. He was convicted on charges in the District of Columbia in July, 1976.

On October 21, 1976, the prosecutor for Westmoreland County secured a writ of habeas corpus ad prosequendum to secure the attendance of petitioner before the grand jury. The writ was executed on October 28, 1976, on which day petitioner was indicted and arraigned. Counsel was appointed and trial set for December 22, 1976. Petitioner was returned to federal custody.

On November 23, 1976, the Circuit Court of Westmoreland County granted petitioner's request for a psychiatric examination and on December 20, 1976, the court granted petitioner's motion for a continuance, setting trial for February 3, 1977.

On January 10, 1977, the prosecutor secured a writ of habeas corpus ad prosequendum in order to make petitioner available for psychiatric examination as requested and arranged by petitioner's counsel. The writ was executed on January 18, 1977. Following such examination petitioner was returned to federal custody.

On January 19, 1977, the prosecutor secured a writ of habeas corpus ad prosequendum to obtain petitioner's presence

for trial. The writ was executed on February 3, 1977, and petitioner was tried the same day.

ARGUMENT AGAINST GRANTING CERTIORARI

The Court of Appeals was correct in holding that United States v. Mauro established new law that a state writ of habeas corpus filed after the lodging of a detainer is a written request for temporary custody within the meaning of Article IV(e) of the Interstate Agreement on Detainers and in utilizing Linkletter v. Walker in holding Mauro nonretroactive.

The petitioner urges two reasons for granting the writ of certiorari. The first is that the rule that a state writ of habeas corpus ad prosequendum is a written request for custody within the meaning of Article IV(e) of the Agreement is not dependent on Mauro. Or, in other words, that while Mauro represents new law as to federal writs of habeas corpus ad prosequendum, it does not represent new law as to state writs of habeas corpus ad prosequendum. The significance of this contention is, of course, that if the Mauro law as to state writs is not new, then petitioner would have the benefit of "automatic retroactivity."

The second reason petitioner urges for granting the writ is that not only did the Court of Appeals erroneously find that Mauro represents new law as to state writs of habeas corpus ad prosequendum, but also that, even assuming that Mauro does represent such new law, the Court of Appeals should have applied Robinson v. Neil, 409 U.S. 505 (1973) in determining retroactivity instead of Linkletter v. Walker, supra.

Respondent submits that the Court of Appeals was correct in finding that Mauro represents new law as to all writs of habeas corpus ad prosequendum, and that under Linkletter-Stovall analysis, such new law is nonretroactive and thus petitioner was entitled

to no relief.

The respondent would point out that until petition for rehearing to the Court of Appeals, petitioner relied on Mauro for his argument that the state writs of habeas corpus ad prosequendum utilized in his case were written requests for temporary custody under the agreement. Only upon petition for rehearing did petitioner assert, as now, that Mauro applies only to federal writs of habeas corpus ad prosequendum.

Petitioner contends that Mauro is not new law, asserting that the decision did not overrule past decisions or decide an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Husen, 404 U.S. 97 (1971). The respondent would point out that this court does not have to overrule prior cases in order to render a new law. See United States v. Bowen, 500 F.2d 960, 975-976 (9th Cir. 1974). Because of the nature of the judicial process and of the lengthy period of time necessary to produce a dispositive interpretation of the law, practice and procedure often develop based on what appears to be the law at the time of the origination of such practice and procedure.

The practice in question in the instant case is the use of a writ of habeas corpus ad prosequendum to secure temporary custody of a prisoner in another jurisdiction for a criminal trial. The use of such writ by states for such purpose has been honored by the federal authorities as a matter of policy. See United States ex.rel. Esola v. Groomes, 520 F.2d 830, 836 n. 18 (3rd Cir. 1975). Prior to the Mauro decision, it was never clearly resolved as to whether the Agreement was the exclusive means of securing temporary custody of a prisoner in another jurisdiction.

The Court of Appeals examined the Chevron Oil Co. criteria and determined that Mauro did establish a new principle of law:

> Prior to Mauro, three of the five courts of appeals that had considered the issue held that transfers pursuant to writs of habeas corpus ad prosequendum were not subject to the Interstate Agreement on Detainers. See Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977) [cert. denied, 436 U.S. 946 (1978)]; United States v. Kenaan, 557 F.2d 912 (1st Cir. 1977) [cert. denied, 436 U.S. 943 (1978)]; United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977) [cert. denied, 436 U.S. 943 (1978)]. The two courts of appeals which had found that the Agreement established rights of prisoners when the writ was utilized did so only over vigorous dissents. See United States v. Sorrell, 562 F.2d 227 (3d Cir. 1977) (en banc) [cert. denied, 436 U.S. 949 (1978)], (dissenting opinion of Weis, J., for himself and two other judges, and dissenting opinion of Garth, J., both appended to companion case of United States v. Thompson, 562 F.2d 232, 235-46 [3d Cir. 1977] [cert. denied, 436 U.S. 943 (1978)]); United States v. Ford, 550 F.2d [732] at 744-45 [(2nd Cir. 1977)] (Moore, J., dissenting); United States v. Mauro, 544 F.2d [588] at 595-97 [(2nd Cir. 1976)] (Mansfield, J., dissenting).
>
> With the exception of the Second Circuit's holding in Ford, none of these decisions attributed dispositive significance to the presence or absence of a detainer. In addition, the Second Circuit's holdings in Mauro and Ford did not apply to situations in which temporary custody was obtained for arraignment and the prisoner was promptly returned. See United States v. Chico, 558 F.2d 1047 (2nd Cir. 1977) [cert. denied, 436 U.S. 947 (1978)]. The Third Circuit's holding in Sorrell apparently applies only to writs issued after the date of that decision. United States v. Boyd, 437 F.Supp. 519 (W.D. Pa. 1977), aff'd without opinion, 578 F.2d 1376 (3d Cir. 1978).

598 F.2d at 838

The Court of Appeals therefore concluded that Mauro authoritatively established a principle of law which "was not clearly foreshadowed." See Chevron Oil, 404 U.S. at 106.

The petitioner makes much of the fact that Mauro dealt with federal, not state, writs of habeas corpus ad prosequendum.

Respondent submits that the distinction drawn between the two is nebulous. While the particular writ of habeas corpus ad prosequendum at issue in Mauro was indeed a federal one, the holding is equally applicable to, and equally new law as to, state writs. (Petitioner does not contend that Mauro is not new law as to federal writs).

Assuming that Mauro is new law, petitioner apparently contends that the Court of Appeals should have applied Robinson v. Neil, supra, to determine its retroactivity instead of applying Linkletter v. Walker, supra, and Stovall v. Denno, supra. The petitioner apparently urges that the Court of Appeals erroneously construed Robinson as applying to cases involving "significantly different" constitutional policies (such as the guarantee against double jeopardy at issue in Robinson), as opposed to construing Robinson as applying to all rulings aimed at preventing a trial from taking place. (The petitioner does not contend that the rights recognized in Mauro are constitutionally protected.) The significance of such argument is that if the Court of Appeals had applied Robinson, a finding of retroactivity of Mauro would have been more likely.

The respondent would point out that, assuming that the Court of Appeals was correct in utilizing Linkletter instead of Robinson, petitioner does not challenge the Court of Appeals' Linkletter result of nonretroactivity on its merits. The petitioner challenges the Court of Appeals' nonretroactivity holding solely on the basis that Robinson was not applied.

The respondent submits that the applicable test was Linkletter. The very reason for this Court's different rule in Robinson was that the double jeopardy claim was significantly different from other constitutional procedural guarantees. 409 U.S. at

508-509. The Robinson analysis is an exception to the generally accepted approach to retroactivity. Subsequent cases by this Court involving retroactivity of criminally related matters indicate that the generally applicable test for retroactivity is the Linkletter analysis not the Robinson analysis. See United States v. Peltier, 422 U.S. 531 (1975); Bowen v. United States, 422 U.S. 916 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975); Hankerson v. North Carolina, 432 U.S. 233 (1977); Michigan v. Payne, 412 U.S. 47 (1973). See, also, United States v. Bowen, supra, where the Ninth Circuit Court of Appeals construed the Robinson analysis as an exception, rather than the rule. 500 F.2d at 979. Furthermore, the respondent contends that the instant case should not have been reviewed under the Robinson analysis since the instant case does not involve any constitutional guarantee which is as important and weighty as the privilege against double jeopardy. What is involved in this case is a federal statutory right which is not constitutionally compelled. It would have been unreasonable to have applied the Robinson approach to the instant case when this Court in other cases has applied the Linkletter analysis to constitutional rights more firmly entrenched than the statutory right under the Agreement.

The Court of Appeals did not misapply Linkletter and the Court of Appeals properly distinguished Robinson.

CONCLUSION

The Court of Appeals for the Fourth Circuit has decided the issues herein in ways which are in accord with the applicable decisions of this Court. Although this Court has broad statutory authority to review petitions for writs of certiorari a petition

will be granted only when there are special and important reasons therefor. Rule 19, Rules of the Supreme Court of the United States.

For the reasons presented, the respondent respectfully submits that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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